

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Atty. Docket: LOESSNER=1

In re Application of:) Confirmation No.
)
Martin LOESSNER et al) Office of Petitions
)
Patent No.: 7,438,901) December 12, 2008
)
Patent Date: October 21, 2008) Washington D.C.
)
For: VIRULENT PHAGES TO ...)

PETITION FOR SUSPENSION OF RULES UNDER 37 C.F.R. §1.183

Honorable Commissioner for Patents
U.S. Patent and Trademark Office
Customer Service Window
Randolph Building, Mail Stop **Petition**
401 Dulany Street
Alexandria, VA 22314

Sir:

In accordance with 37 CFR 1.183, patentee hereby petitions for waiver of that portion of 37 CFR 1.705(d) that requires any request for reconsideration of the patent term adjustment indicated in a patent to be filed within two months of the date that the patent issues. The above-identified patent issued on October 21, 2008. Thus, a request for reconsideration under 37 CFR 1.705(d) had to be filed by December 21, 2008. However, due to an inadvertant docketing error, this date was missed.

Attached hereto are two supporting declarations and a request for reconsideration under 1.705(d). Also submitted

herewith is the fee therefor as well as the fee set forth in 1.17(f) required for the present petition. As this is an extraordinary situation, required by justice, waiver of the two-month time period set forth in this rule and acceptance of the attached request for reconsideration of the patent term adjustment as having been timely submitted are respectfully urged.

STATEMENT OF FACTS INVOLVED

The undersigned is a registered patent attorney. He is also a Member (equivalent to a partner) of Browdy and Neimark, P.L.L.C. (hereinafter Browdy and Neimark), and as such he is familiar with all of the operating procedures of Browdy and Neimark. All statements made in this Statement of Facts that are made by him based on his own knowledge of the activities and procedures of Browdy and Neimark are true and correct.

On September 30, 2008, the U.S. District Court for the District of Columbia issued its decision *Wyeth v. Dudas*, 2008 U.S. Dist. LEXIS 76063, 88 USPQ2d 1538 (D.D.C. Sept. 30, 2008). This case held that the manner in which the Patent and Trademark Office had been interpreting the period of overlap as provided in 37 CFR 1.703(f) was incorrect.

After issuance of the *Wyeth* decision, I caused Browdy and Neimark to commence a review of all patents issued

within two months prior to this decision and all patents issued thereafter to determine if each such patent might possibly be subject to a longer patent term adjustment in view of the new interpretation required by the *Wyeth* case. Thus, I instructed that every case having a filing date or a 371(c) date more than three years prior to the date of issue, or prior to the date of first filing of any RCE, be flagged as being a case for which the new interpretation of the *Wyeth* case might be relevant. For each of these cases so flagged, I instructed that the deadline for filing a request for reconsideration of patent term adjustment be docketed for two months from the issue date, which date is set by 1.705(d). I worked with Mr. Randy Davis, Docketing Supervisor, and Ms. Erin Geraghty, Office Manager, to train them in this new procedure.

When the above identified patent issued, it was noted that the 371(c) date was more than three years prior to the issue date and that no RCEs had been filed. Accordingly, it was flagged as being one for which the new *Wyeth* interpretation was possibly relevant and the deadline for filing a request for reconsideration of PTA was docketed by Mr. Randy Davis.

Attached hereto is a Declaration of Mr. Randy Davis explaining that he misdocketed this date to be January 21,

2009, rather than December 21, 2009, and that this was strictly due to an inadvertant human error. His Declaration further explains that this was an isolated error that had not been made with respect to any of the other patents that he docketed for this purpose and that the electronic system is now being reprogrammed to have this date automatically calculated.

On November 12, 2008, I sent a letter was sent to the client in this case informing it that the patent could be subject to an additional 325 days of patent term if the interpretation of the *Wyeth* decision was eventually accepted by the Patent and Trademark Office. This letter correctly informed the client that the deadline for filing the request for reconsideration was December 21, 2008. Instructions were requested by December 15, 2008. A copy of this letter is submitted herewith as Exhibit D.

On December 2, 2008, an email was received from the client stating that they wished to file a request for reconsideration of the patent term. When these instructions were received, Mr. Davis marked the email with the date that had been docketed in the docketing system, i.e., January 21, 2009. See the Davis Declaration. A copy of these instructions with Mr. Davis' handwritten notations thereon is submitted herewith as Exhibit A.

The case was then promptly taken up by the office manager, Ms. Erin Geraghty, to do a draft of the request for reconsideration. However, this draft was not given to the undersigned for review and revision until December 24, 2008. When preparing the draft, Ms. Geraghty failed to notice the error in the docketed date. See the attached Declaration of Ms. Geraghty.

When I picked up this case for review on December 24, 2008, the error was immediately noticed, the request for reconsideration was completed and the present petition for suspension of the two month requirement of 37 CFR 1.705(d) was prepared and filed.

ACTION REQUESTED

It is requested that the two month requirement of 37 CFR 1.705(d) be waived so that the attached request for reconsideration, which is being filed only two days late (December 21, 2008, being a Sunday so that the actual due date was Monday December 22, 2008), will be accepted as having been timely filed.

MEMORANDUM IN SUPPORT

37 CFR 1.183 provides that in an extraordinary situation, when justice requires, any requirement of the regulations that is not a requirement of a statute may be suspended or waived by the Director or the Director's designee

on petition of the interested party subject to such other requirements as may be imposed. Any petition under this section must be accompanied by the petition fee set forth in 37 CFR 1.17(f).

The petition fee set forth in §1.17(f) is submitted herewith. If this fee is not received or if any other fee is deemed to be due for consideration of this petition, the Director is authorized to charge any such fee or deficiency to deposit account no. 02-4035 of the undersigned.

The two month deadline of 1.705(d) is not required by statute. The statute dealing with patent term adjustment is 35 U.S.C. 154. The applicable provision of this statute appears to be 35 U.S.C. 154(b)(3)(A), which states that the Director shall prescribe regulations establishing procedures for the application for and determination of patent term adjustments under this sub-section. Thus, the two month term is not required by statute and thus may be suspended or waived in extraordinary situations where the interest of justice requires.

The above recitation of facts shows that this is an extraordinary situation and that the interest of justice requires waiver of the deadline to the extent necessary to accept the attached request for reconsideration, filed 2 days late, as having been timely submitted. The error occurred

solely due to an inadvertant docketing error on the part of an experienced and trustworthy employee. Because the procedure of flagging and docketing cases that might benefit from the *Wyeth* interpretation was new in the office of Browdy and Neimark, the electronic docketing system had not yet been reprogrammed to automatically generate the date rather than requiring a manual calculation. Steps are now being completed to cause this date to be automatically generated so that such an error cannot occur in the future.

Justice requires the late acceptance of the attached request for reconsideration, because the client requested that it be filed in a timely manner and should not be prejudiced by an inadvertant docketing error in the office of the undersigned.

Accordingly, granting of this petition and acceptance of the attached request for reconsideration as having been timely filed are earnestly solicited.

Respectfully submitted,

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